Supreme Court, U.S.
FILED
06-198 AUG 3 - 2006
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

EMMETTE J. JACOB, JR.
AND LE VIDEO STORE, INC.,

Petitioners

v.

STATE OF LOUISIANA

On Petition for Writ of Certiorari to the
Supreme Court of Louisiana

PETITION FOR WRIT OF CERTIORARI

J.D. OBENBERGER
Counsel of Record
REED LEE
J.D. Obenberger & Associates
70 West Madison Street
Suite 3700
Chicago, Illinois 60602
(312) 558-6427

WILLIAM L. GOODE
The Goode Law Firm
812 Johnston Street
Lafayette, Louisiana
70501

(337) 234-0600

Counsel for Petitioners

QUESTIONS PRESENTED

The State of Louisiana has charged the Petitioners with three counts each of Obscenity alleging that they sold two legally obscene videotapes and a legally obscene magazine. The State has not alleged, however, that the Petitioners ever sold or exposed any legally obscene expression to minors or to unwilling adults.

1. Whether the Petitioners have a constitutional right to supply, through discrete commercial channels, obscene expression to consenting adults for their private possession and use?

2. Whether the government may regulate obscenity for reasons other than preventing its exposure to children or to unwilling adults?

3. Whether Louisiana may try the Petitioners for Obscenity in light of its confusion over the scope of the community whose standards govern the determination of obscenity *vel non*?

PARTIES TO THE PROCEEDNG

Emmette J. Jacob, Jr. and Le Video Store, Inc. were the Appellants before the Louisiana Supreme Court and before the Louisiana Court of Appeal, Third Circuit. They were and are the Defendants in the criminal proceeding pending before the Sixteenth Judicial District Court in the Parish of St. Martin.

The State of Louisiana was the sole Appellee before the the Louisiana Supreme Court and before the Louisiana Court of Appeal, Third Circuit, and it was and is the sole Plaintiff in the criminal proceeding pending before the Sixteenth Judicial District Court in the Parish of St. Martin.

CORPORATE DISCLOSURE STATEMENT

Emmette J. Jacob, Jr. is a natural person and not a corporation.

Le Video Store, Inc. is a Louisiana corporation. It has no parent corporation and no publicly held company holds ten percent or more of its stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF APPENDICES v

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 4

A. Importance of the Question 4

B. Privacy, the First Amendment, and Personal Autonomy 6

I. The Petitioners Have a Constitutional Right to Supply, Through Discrete Commercial Channels, Obscene Expression to Consenting Adults for Their Private Possession and Use 8

A. Private Possession/Public Commerce distinction 8

B. Commerce in expression: Campaign Finance 9

C. Commerce in expression: Publishing and Broadcasting 11

II. The Government May Regulate Obscenity Only to Prevent Its Exposure to Children or to Unwilling Adults 13

A. *Chaplinsky* Two-Level Approach to Speech Protection 13

B. Rejection of All-or-Nothing-at-All Application 15

C. Reasons and Limits in the Law of Obscenity 19

III. Louisiana May Not Try the Petitioners for Obscenity Because It Has Not Given Them Fair Notice of the Community Standards Which Properly Apply to a Determination of Obscenity Vel Non 21

CONCLUSION 24

TABLE OF APPENDICES

Appendix A Louisiana Supreme Court Judgment 1a

Appendix B Louisiana Court of Appeal Decision 2a

Appendix C Trial Court Decision and Judgment 4a

TABLE OF AUTHORITIES

Arkansas Writers' Project v. Ragland,
481 U.S. 221 (1987) 12

Ashcroft v. Free Speech Coalition,
535 U.S. 234 (2002) 7, 14

Book Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney General,
383 U.S. 413 (1966) 20

Bose Corp. v. Consumers Union of United States, Inc.,
466 U.S. 485 (1984) 15

Brown v. Socialist Workers '74 Campaign Committee,
459 U.S. 87 (1982) 6, 10

Buckley v. Valeo,
424 U.S. 1 (1976) 5, 9, 10

Carolene Products Co. v. United States,
304 U.S. 144 (1938) 16

Chaplinsky v. State of New Hampshire,
315 U.S. 568 (1942) ..... passim

Frisby v. Schultz,
487 U.S. 474 (1988) 6

Ginsberg v. State of New York,
390 U.S. 629 (1968) 17

Lawrence v. State of Texas,
539 U.S. 558 (2003) 4, 7, 18

Leathers v. Medlock,
499 U.S. 439 (1991) 12

McConnell v. Federal Election Commission,
540 U.S. 93 (2003) 10

McIntyre v. Ohio Elections Commission,
514 U.S. 344 (1995) 6, 10

Miller v. State of California,
413 U.S. 15 (1973) 18, 20

Minneapolis Star & Tribune Co. v.
Minnesota Commissioner of Revenue,
460 U.S. 575 (1983) 5, 12

NAACP v. State of Alabama ex rel. Patterson,
357 U.S. 449 (1958) 6

Paris Adult Theatre I v. Slaton,
413U.S. 49 (1973) ..... passim

Planned Parenthood v. Casey,
505 U.S. 833, 851 (1992) 7

Police Department of Chicago v. Mosely,
408 U.S. 92 (1972) 7

Public Utilities Commission v. Pollak,
343 U.S. 451 (1952) 6

R.A.V. v. City of St. Paul,
505 U.S. 377 (1992) 5, 6, 16, 18, 20

Roe v. Wade,
410 U.S. 113 (1973) 6

Roth v. United States,
354 U.S. 476 (1957) 4, 16, 19, 20

Rowan v. United States Post Office Dept.,
397 U.S. 728 (1970) 6

Sable Communications of California, Inc. v. FCC,
492 U.S. 115 (1989) 15, 17

Schad v. Borough of Mt. Ephraim,
452 U.S. 61 (1981) 11

Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board,
502 U.S. 105 (1991) 5, 12, 13

Stanley v. State of Georgia,
394 U.S. 557 (1969) ..... passim

United States v. 12 200-Foot Reels,
413 U.S. 123 (1973) 8, 13

United States v. Grace,
461 U.S. 171 (1983) 17

United States v. Orito,
413 U.S. 139 (1973) 4, 8, 9, 11, 13

United States v. Playboy Entertainment Group, Inc.,
529 U.S. 803 (2000) 11, 14

United States v. Reidel,
402 U.S. 351 (1971) 5, 8, 9, 11, 32

United States v. Thirty-Seven (37) Photographs,
402 U.S. 363 (1971) 8, 12, 13, 19

Virginia, State of v. Black,
538 U.S. 343 (2003) 14

West Virginia State Board of Education v. Barnette,
319 U.S. 624 (1943) 7

Williamson v. Lee Optical of Oklahoma,
348 U.S. 483 (1955) 16

Winters v. State of New York,
333 U.S. 507 (1948) 11

U.S. Const. Amend 1 ..... passim

28 U.S.C. § 1257 1

Z. Chafee, *Free Speech in the United States* (1941) 19

Bickel, *Dissenting and Concurring Opinions I*,
22 The Public Interest 25 (Winter 1971) 9

Kalven, *The Metaphysics of the Law of Obscenity*,
1960 S. Ct. Rev. 1 14

Sunstein, *Pornography and the First Amendment*,
1986 Duke L.J. 589 16

PETITION FOR WRIT OF CERTIORARI

NOW COME the Petitioners, Emmette J. Jacob, Jr. and Le Video Store, Inc., and respectfully request that this Court issue a writ of certiorari to the Supreme Court of Louisiana to review the judgment of that court denying review of the opinion and judgment of the Louisiana Court of Appeal, Third Circuit, which opinion and judgment affirmed in part and reversed in part the ruling of the Sixteenth Judicial District Court denying the motion by the Petitioners, the Defendants in the trial court, to dismiss the charging instruments which the State of Louisiana has lodged against them.

OPINIONS BELOW

The judgment of the Louisiana Supreme Court denying review is reported at 927 So. 2d 324, 2006- 0583 (La. 2006). It appears in the Appendix at 1a. The opinion and judgment of the Louisiana Court of Appeal, Third Circuit, is not reported. The brief order issued by that court appears in the Appendix at 2a. The opinion and judgment of the Sixteenth Judicial District Court is not reported, but it appears at some length in the Appendix at 4a.

JURISDICTION

The Supreme Court of Louisiana issued its judgment denying review on May 5, 2006, and no party sought rehearing below. This Court has jurisdiction over this Petition pursuant to Section 1257(a) of Title 28 of the United States Code because the validity of Louisiana's obscenity statute is drawn into question under the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This criminal case is founded upon separate charging instruments – bills of information – lodged against each of the Petitioners. Each charging instrument alleges three counts of Obscenity, asserting that an agent of the Petitioners sold, rented, or otherwise distributed two allegedly obscene videotapes and one allegedly obscene magazine. The videotapes and magazine referred to in the separate charging instruments are identical, and both of the char-

ging instruments appear to be predicated upon the same underlying transactions and occurrences.

In the trial court, the Petitioners moved to quash the charging instruments on the grounds that the State cannot lawfully or constitutionally prosecute them on the facts alleged in the charging instruments. Pursuant to orders of the trial court, the matter was fully briefed, and the trial court heard extensive oral argument on August 12, 2005. On October 5, 2005, the trial court entered a decision and judgment denying the Petitioners' motion to quash , and it stated its reasons for that denial at some length. App. 4a.

On November 2, the Petitioners filed their notice of intent to file an application for supervisory writs, and, on the same day, the trial court established a return date pursuant to Louisiana court rules. Within the period initially set for return, the Petitioners moved for, and the trial court thereafter granted, an extension of the return date. Within the extended return date, the Petitioners moved for, and the trial court granted, a further extension of the return date to December 16, 2005. On that day, the Petitioners filed their applications for the supervisory writs.

On February 2, 2006, the Louisiana Court of Appeal, Third Circuit, issued its decision and judgment granting the Petitioners' application in part, and directing the trial court to consider the Petitioners' overbreadth challenge to Louisiana's obscenity statute. In all other respects, however, the Court of Appeal denied the writ application and affirmed the trial court's disposition of the Petitioners' motion to quash. App. 2a. The Petitioners timely sought review of the Court of Appeal's judgment in the Louisiana Supreme Court, but on May 5, 2006, that Court denied review. App. 1a.

REASONS FOR GRANTING THE PETITION

Half a century ago, this Court first stated in *dicta*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942), and then squarely held, *Roth v. United States*, 354 U.S. 476 (1957), that "obscenity is not within the area of constitutionally protected speech and press." *Id* at 485. The trial court's recitation of this familiar proposition does not, however, end the constitutional analysis in this case. To be sure, the State alleged below that the expression at issue here is legally obscene,[1] but it has altogether failed to allege that the Petitioners exposed any of that expression to minors or to unwilling adults. Contemporary constitutional jurisprudence has developed to a point where such an omission is now fatal.

In the first place, more than one constitutional protection limits the governmental regulations challenged here, so that an exception limiting the scope of only one such protection will leave others in full force and effect. This Court has recently recognized that constitutionally protected privacy interests flatly limit the extent to which the government may regulate the way in which an adult may engage in consensual intimate relations with another adult. *Lawrence v. State of Texas*, 539 U.S. 558, 575, 578 (2003). *A fortiori*, those same interests protect adults in choosing to make even legally obscene pornography a part of their own private, intimate sexual activities, *cf. Stanley v. State of Georgia*, 394 U.S. 557, 568 (1969), whether those activities are solitary or involve another consenting adult. So it is clear that constitutional privacy protections limit the permissible scope of obscenity statutes even if those statutes fit comfortably within the obscenity exception to the First Amendment's free speech clause.

---

[1] Given the present procedural posture of this case, this Court must assume the truth of the State's allegation in this regard.

Beyond this, constitutional developments over the past three decades have thoroughly undercut any legitimate rationale for treating the commercial distribution of obscenity differently from the private possession which has long been recognized as constitutionall protected. *Compare, e.g., Stanley v. State of Georgia*, 394 U.S. 557, 568 (1969), *with United States v. Orito*, 413 U.S. 139, 141 (1973), *and United States v. Reidel*, 402 U.S. 351, 355 (1971). Seminal First Amendment cases decided since 1973 have now unmistakably established that the connection – necessary in our economy – between money and expression raises a free speech barrier to governmental attempts to ban or substantially burden commerce in expression. *Buckley v. Valeo*, 424 U.S. 1, 19, 39 (1976); *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 116 (1991); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 582-83, 592-93 (1983). Thus, contrary to the State's position in this case, this Court's older rulings simply failed to anticipate the substantial First Amendment protection now afforded to commerce in expression. *E.g. United States v. Reidel*, 402 U.S. 351, 355 (1971); *see also Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 (1973).

Finally, and even more fundamentally, this Court has recently refined the constitutional analysis surrounding the traditionally "unprotected" categories of expression. As a result, it is now clear that government may legitimately regulate obscenity – like the other "well-defined and narrowly limited classes of speech" recognized under *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571-72 (1942) – only for the specific reasons why it has been recognized as a constitutionally "unprotected" category of expression in the first place. *Cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-84 (1992). The holding, which the Petitioners acknowledge at the outset, that obscenity is an

"unprotected" category of expression "surely do[es] not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government may regulate them freely." *R.A.V.* at 384 (quotation marks and citation omitted); *but cf. Paris Adult Theatre I. v. Slaton*, 413 U.S. 49, 57-69 (1973). It merely means that, under the First Amendment, governments have *some* legitimate reasons for regulating that content-based category of expression and that they may regulate it for *those* reasons. But a *careful* examination of this Court's obscenity cases reveals that the only surviving reasons why obscenity is, as a *constitutional* matter, treated specially are that it may offend unwillingly exposed adults and that it may harm exposed children. Those concerns are altogether absent here.

An initial word is in order concerning the very close connection between constitutional privacy arguments and the First Amendment arguments articulated *infra*. In the first place, it is important to recognize that the precise focus of constitutional "privacy" analysis often shifts, sometimes *sub silentio*, from a predominant concern about secrecy[2] to one of repose[3] to one of autonomy.[4] It may well be that these basic foci relate to one another in important ways, as, for instance, a certain amount of secrecy may be necessary for genuine repose. But whatever their precise

---

[2] *See, e.g., McIntyre v. Ohio Elections Commission*, 514 U.S. 344 (1995); *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982); *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

[3] *See, e.g., Frisby v. Schultz*, 487 U.S. 474 (1988); *Rowan v. United States Post Office Dept.*, 397 U.S. 728 (1970); *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952).

[4] *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973).

"spatial and more transcendent dimensions," *Lawrence v. State of Texas*, 539 U.S. 558, 562 (2003), at any given moment, constitutional sexual privacy concerns predominately focus upon the *autonomy* of the individual in making decisions about consensual sexual activity. *See Lawrence* at 562 ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct").

Because the First Amendment also protects individual autonomy in areas similarly central to an individual's "personhood," *Lawrence* at 574 (2003), *quoting Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) – *i.e.* in the choice of what to say and write and what to hear and read and, ultimately, what to think and believe, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) – free speech and sexual privacy protections are indeed so similar that they may be seen to blend into one another where sexually explicit expression is concerned, much as the First Amendment's Free Speech Clause seems to blend into the Equal Protection Clause when content discrimination is involved. *Police Department of Chicago v. Mosely*, 408 U.S. 92, 94-96 (1972). For this reason, constitutional privacy arguments and those advanced directly under the First Amendment fully reinforce one another. They are in no way inimical, and they each have their separate source in similar and overlapping principles firmly established by the Constitution.

I. The Petitioners Have a Constitutional Right to Supply, Through Discrete Commercial Channels, Obscene Expression to Consenting Adults for Their Private Possession and Use.

In *Stanley v. Georgia*, 394 U.S. 557 (1969), this Court recognized that the mere private possession of legally obscene material is protected by the First Amendment. *Id.* at 568. Over the next four years, however, this Court expressly and deliberately refused to extend similar constitutional protection to the commercial distribution which is necessary – as a practical matter – to enable the private possession of obscene expression. *United States v. Riedel*, 402 U.S. 351, 355 (1971) ("Whatever the scope of the 'right to receive' referred to in *Stanley*, it is not so broad as to immunize the dealings in obscenity in which Reidel engaged here"); *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 376 (1971); *United States v. 12 200-Foot Reels*, 413 U.S. 123, 128 (1973); *United State v. Orito*, 413 U.S. 139, 141 (1973); *see also Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 (1973)(rejecting contention that obscenity was protected in a motion picture theater because it was restricted to consenting adults).

In so doing, virtually all of the Justices addressing the issue contrasted the right to read and see what one pleases with the right to *sell* reading or viewing material to others or to move it through the channels of *commerce*. *See, e.g.*, *Reidel*, 402 U.S. at 359 (Harlan, J., concurring)("the 'right to receive' recognized in *Stanley* is not a right to the existence of modes of distribution of obscenity which the State could destroy without serious risk of infringing on the privacy of a man's thoughts"); *Thirty-Seven Photographs*, 402 U.S. at 376 (White, J., plurality) ("That the private user under *Stanley* may not be prosecuted for possession of obscenity in his home does not mean that he is entitled to import it from abroad free from the power of Congress to

exclude noxious articles from commerce"); *Reidel* 402 U.S. at 361 (Marshall, J., concurring) ("mail order distribution poses the danger that obscenity will be sent to children").[5]

Chief Justice Burger, in particular, repeatedly sought to juxtapose the private home against a more "public" commerce. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57, 66 (1973); *United State v. Orito*, 413 U.S. 139, 142-43 (1973). With the possible exception of a vague general concern about the "tone of . . . the market," *Paris Adult Theatre* at 59, *quoting* A. Bickel, *Dissenting and Concurring Opinions I*, 22 The Public Interest 25-26 (Winter 1971), all of the Justices' concerns about commerce focused almost exclusively on a concern that obscenity might be exposed to minors or unwilling adults. *E.g. Paris Adult Theatre* at 59 n. 7 (1973).

Whatever their precise basis, all of the holdings distinguishing commercial transactions in obscenity from the private possession thereof came between 1971 and 1973, and this Court has not carefully reconsidered this question since. Yet several important constitutional developments over the ensuing three decades have thoroughly undercut any viable distinction between expression *simpliciter* and commerce in expression

Most obvious are the cases concerning the constitutionality of statutes regulating political campaign financing. In the seminal case of *Buckley v. Valeo*, 424 U.S 1 (1976), this Court fundamentally rejected a speech/conduct dis-

---

[5] Justice Marshall's concerns – plainly shared by some other Justices as well – focused upon "mail order distribution" as presented in *Riedel* and as it existed in those days: persons ordering through the mail were simply asked to state in writing that they were of proper age. *Reidel* at 353 n. 3. The much more direct, face-to-face transactions at issue in this case plainly provide for *much* better protection against Justice Marshall's fears.

tinction between actually speaking, on one hand, and *paying* to produce, distribute, or obtain speech, on the other. *Id.* at 15-20. It repeatedly recognized that, in our society, any limitation on payment for expression amounts to a very real limitation on the expression itself. *Id.* at 19 ("virtually every means of communicating ideas in today's mass society requires the expenditure of money"), 39 ("expenditure ceilings impose direct and substantial restraints on the quantity of political speech"). Campaign financing standards are thus subject to detailed and searching scrutiny under the First Amendment itself. *McConnell v. Federal Election Commission*, 540 U.S. 93, 137 (2003) (limits on political contributions subject to intermediate "closely drawn" scrutiny); *Buckley* at 44 (regulations concerning direct campaign expenditures subject to most exacting constitutional scrutiny). They cannot benefit from mere rational basis scrutiny either as regulations of mere conduct, *Id.* at 16, or under any other guise. *Id.* at 17-18.

This Court's campaign financing cases make it clear that the fact that expression is sold to others, *Buckley* at 16, or purchased for one's self, *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 337 (1995), is not a permissible reason for removing the otherwise applicable constitutional protections surrounding the expression. *Buckley* at 48. In this case, the money spent to produce, distribute, and purchase sexually explicit expression is analogous to direct campaign expenditures, rather than to political contributions to others. The money paid goes to finance expression of the payer's choice, not to fund another person's or organization's choice of expression to be directed elsewhere. Indeed, payments by the Petitioners' customers are most similar to a candidate's own personal campaign expenditures, *cf. Buckley* at 51-54, while the Petitioners themselves are directly analogous to a paid printer who may receive campaign disbursements in order to provide expressive materials to a purchaser, *cf. Brown v. Socialist*

Workers '74 Campaign Committee, 459 U.S. 87, 91-98 (1982).

The Justices who considered the questions surrounding the commercial distribution of obscene materials for private use over three decades ago simply did not have the benefit of the very elaborate constitutional analysis which has developed as a result of the legal controversies surrounding the campaign financing statutes and regulations. Their uniformly cursory analysis of the private possession/public commerce question, *cf., e.g., United States v. Reidel*, 402 U.S. 352-57 (1971); *United States v. Orito*, 413 U.S. 140-145 (1973), was, to say the least, far less nuanced than current constitutional analysis, and it took no account whatsoever of the critical significance of money to speech which has now become a constitutional commonplace. In this day and age, the fact that the Petitioners engage in the commercial distribution of sexually explicit expression can no longer be deemed to limit their constitutional rights. Since their consenting adult customers retain the right to possess even legally obscene pornography privately, the Petitioners have a right to supply that demand through secure private channels of commerce.

Nor is the necessity of considering financing limits as expression limits confined to situations involving core political expression. This Court has consistently made it unmistakably clear that entertainment – even quite salacious entertainment – is no less constitutionally protected than is core political expression. *Winters v. State of New York*, 333 U.S. 507, 510 (1948)("line between informing and entertaining is too elusive for the protections of that basic [free press] right"); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 811 (2000). This Court has thus articulated substantial constitutional protection for commerce in speech well outside of the core political category,

again well after the 1971 and 1973 decisions upon which the court of appeals relied.

In *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991), this Court struck down a statute which – in the interest of compensating crime victims – effectively deprived convicts of the right to be paid for books which they might write describing their crimes. The Court had no trouble recognizing that the statute imposed content-based restrictions, *Id.* at 116 ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech"), and it concluded that the challenged statutory limitation on commercial transactions surrounding potential books relating to notorious crimes amounted to a limitation on those books themselves, *Id.* at 123 (state impermissibly "singled out speech on a particular subject for a financial burden [imposed] on no other speech and no other income").

Indeed, this Court has applied – also well after 1973 – similarly strict constitutional scrutiny, *Leathers v. Medlock*, 499 U.S. 439, 447 (1991), and reached similar conclusions, *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 227-31 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner or Revenue*, 460 U.S. 575, 582-83, 592-93 (1983), even where commercial transactions concerning particular expression were subject to special taxation rather than being limited or regulated more directly. Just as it was no answer in *Simon & Schuster* and these tax cases that the targeted speaker could write, publish, and distribute books gratuitously, it is no answer here that the Petitioners or their customers could conceivably publish, distribute, or obtain the items protected by *Stanley* entirely outside of the channels of commerce. *Cf. United States v. Thirty-Seven Photographs*, 402 U.S. 363, 382 (1971)(Black,

J., dissenting)(contemplating "man [who] writes salacious books in his attic, prints them in his basement, and reads them in his living room").

In distinguishing between expression and commerce in expression, *Reidel*, *Thirty-Seven Photographs*, *Paris Adult Theatre*, *Orito*, and *12 200-Foot Reels* have not survived subsequent constitutional developments. They cannot be squared with the subsequent decisions which have expressly recognized that limitations on expenditures for or commerce in particular expression amount to a direct suppression of that expression itself. This Court should reexamine the cases upon which the court of appeals relied.

II. The Government May Regulate Obscenity Only to Prevent Its Exposure to Children or to Unwilling Adults.

Most expression is immune from content-based government regulation unless the restrictions can withstand strict scrutiny. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 118 (1991). In contrast, some expression can be regulated precisely *because* of its content. Beginning with *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942), this Court noted that::

> Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting"

> words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Id. at 571-72 (footnotes, quotation marks, and citation omitted). Thus speech can be *categorized by content*, for constitutional purposes, and a few narrow speech categories have been said since *Chaplinsky* to be constitutionally unprotected while most fall fully within "the freedom of speech, or of the press," U.S. Const. Amend 1 cl. 3, 4, and are thus protected. *State of Virginia v. Black*, 538 U.S. 343, 358-60 (2003). Set, as it is, against the backdrop of a firm presumption that expression is protected by the First Amendment, *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816-17 (2000), *Chaplisnky's* so-called "two-level" approach to speech protection, *cf.* H. Kalven, *The Metaphysics of the Law of Obscenity*, 1960 S. Ct. Rev. 1, 10, has served the First Amendment well.

Two essential characteristics of that approach have stood the test of time and remain critical to the very substantial protection which the Constitution affords to expression. First, as just noted, the *Chaplinsky* approach is universally understood to stand against a prior and more fundamental presumption that all expression is protected by the First Amendment. *E.g. Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 251 (2002); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000). Among other things, this means that the burden is always on the government to demonstrate, by the appropriate quantum of proof and under the applicable constitutional standard that particular expression falls within a constitutionally unprotected class of expression. *Id.* at 816. The second critical feature is that the question of full constitutional protection *vel non* is assessed and answered categorically in the sense that if the precise expression at issue falls outside of an unprotected category, even by just a bit,

it remains fully protected on the same terms and by the same constitutional standards as even the most clearly protected expression. *Free Speech Coalition*, 535 U.S. at 240, 251.

These features of the *Chaplinsky* approach remain valuable bulwarks against the potential erosion of constitutional protections which would arise if the level of speech protection were assessed on a case-by-case balancing basis against a spectrum of expression. In other words, it is critical that expression is presumed to be on the broad protected constitutional plateau rather than in a narrow unprotected hole and, further, that the boundaries between the vast plateau and rare holes are constitutional cliffs, not gentle and extensive downhill slopes. These very speech-protective features of the *Chaplinsky* approach are entirely independent of the new constitutional developments addressed *infra*, and the instant *amici* do not call these features into question in any way.

A third characteristic of the two-level approach to speech protection, however, was often casually articulated and sometimes directly applied in the years following *Chaplinsky*. Although *Chaplisnky* never actually *said* as much, this Court eventually came to speak as if expression falling within one of the "unprotected" categories was altogether unprotected by the First Amendment. *E.g. Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115, 124 (1989); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504 (1984). That is, this Court assumed for a time that such expression was entitled to no heightened First Amendment scrutiny under any circumstances, so that *any* substantive regulation of obscenity – or other "unprotected" speech category – could be supported by *any* rational basis. Many rational bases, the Court thought, could be assigned to regulate speech which had no special constitutional protec-

tion, *Roth v. United States*, 354 U.S. 476, 485-87 (1952); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57-69 (1973) (enumerating rational bases for banning obscenity *once* it had been established that obscenity was categorically unprotected in the first place, *Id.* at 54, 57, 60, 61, 63-64, 66, 67), just as many rational bases support regulation of other constitutionally unprotected matters. *See, e.g., Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 487-88 (1955); *but see Carolene Products Co. v. United States*, 304 U.S. 144, 153 n. 4 (1938).

But this Court has now expressly recognized that *Chaplinsky* does *not*, after all, mean that certain classes of expression – even "well-defined and narrowly limited classes," *Chaplinsky*, 315 U.S. at 571 – are *altogether* unprotected by the First Amendment. The proposition that obscenity, for instance, can be suppressed without raising "any Constitutional problem," *Id.* at 572, ultimately entails nothing more than a recognition that there is *at least one* constitutionally acceptable reason for suppressing it; it does not necessarily mean that *any* reason will do. In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), this Court put it this way:

> We have sometimes said that these categories of expression are not within the area of constitutionally protected speech, or that the protection of the First Amendment does not extend to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity "as not being speech at all," Sunstein, Pornography and the First Amendment, 1986 Duke L.J. 589, 615 n. 146. What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.) – not that they are cate-

> gories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. . . .
>
> Our cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government may regulate them freely. That would mean that a city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government. Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well.

Id. at 383-84 (emphasis in original, quotation marks and citations omitted). This observation that the 'holes' which *Chaplinsky* recognized in the First Amendment's protection are not constitutional bottomless pits should come as no surprise. After all, even on the constitutional plateau, expression is not absolutely *protected* from regulation under all circumstances, *e.g. Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115, 126 (1989)(strict scrutiny for content-based regulations); *United States v. Grace*, 461 U.S. 171, 177 (1983)(intermediate scrutiny for time, place, and manner regulations), so there is conversely no reason to expect that expression will be absolutely *un*protected in the holes. Moreover, there are additional clues that an "all-or-nothing-at-all approach" is too "simplistic." Certain sexual expression, for instance, remains fully protected when disseminated to adults even while it is obscene as to minors. *Ginsberg v. State of New York*, 390 U.S. 629, 635 (1968). Even more to the present point, obscenity itself

remains constitutionally protected when privately possessed by an adult, *Stanley v. State of Georgia*, 394 U.S. 557, 568 (1969), even though the same content can be criminally sanctioned if placed on a billboard or sent through unsolicited mail, *Miller v. State of California*, 413 U.S. 15, 18 (1973). This suggests that the *context* in these examples helps to relate the "proscribable content" to the permissible reasons supporting proscription.

As the result in *R.A.V.* demonstrates, 505 U.S. at 391-92, the recognition that certain categories of expression can be regulated for some reasons but not for others requires an inquiry into whether a particular restriction is appropriately tailored to a constitutionally permissible reason. And, for present purposes, *that* necessitates a determination of just what reason or reasons warrant the conclusion that obscenity as a class is "unprotected" by the First Amendment.[6]

---

[6] It is quite telling that the *R.A.V.* refinement of the *Chaplinsky* two-level approach to speech protection was, in fact, anticipated in a prior obscenity case. As the author of this Court's opinion in *Stanley v. State of Georgia*, 394 U.S. 557 (1969), later explained: ". . . *Stanley* turned on an assessment of which interests may legitimately underpin governmental action . . .." *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 351, 360 (1971)(Marshall, J., dissenting). Indeed, much of this Court's opinion in *Stanley* is devoted to determining the constitutional *im*permissibility of those governmental interests which could logically support a ban on the private possession of obscenity. *Stanley* at 263-68 (rejecting suggested governmental interests such as preserving the current morality against social change or evolution resulting from the dissemination of expression, *Id.* at 565-66,and protecting against crime, *Id.* at 566-67). *Stanley's* rejection of these interests has plainly stood the test of time. *Cf. Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973)(citing *Stanley* and noting "we need not quarrel with this."); *Lawrence v. State of Texas*, 539 U.S. 558, 577 (2003)("fact that the governing majority . . . has traditionally viewed a particular practice as immoral is not sufficient reason for . . . prohibiting the practice")(citation omitted).

When it first discussed obscenity in connection with the First Amendment, *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571-72 (1942), this Court cited an analysis which strictly limited those reasons to the prevention of offense to unwillingly exposed adults and protecting the development – moral or otherwise – of children. *Id.* at 572 nn. 4, 5, *citing* Z. Chafee, *Free Speech in the United States* 149-50 (1941). An examination of the cited section of Professor Chafee's book readily discloses that Chafee was overwhelmingly concerned with the offense which certain expression may give to others and with the breaches of peace which likely result therefrom. *Id.* at 149-51. To be sure, Chafee mentions "morality" as an underlying concern, *Free Speech* at 150, and *Chaplinsky* closely paraphrases him in doing so, *Chaplinsky* at 572. But even a cursory reading of Chafee's actual analysis confirms that this concern is restricted to the moral development of *children*. *Free Speech* at 150 ("Adulterated candy is no more poisonous *to children* than some books" (emphasis added)). Indeed, Chafee himself expressly criticizes the suppression of obscenity to promote the morality of adults. *Id.* at 150-51 (criticizing use of obscenity as "a roundabout modern method to make heterodoxy in sex matters . . . a crime"). This is the reasoning – the only reasoning – on which *Chaplinsky* relied in setting up the two-level approach to speech protection.

The one other significant attempt to introduce another possible reason why obscenity is unprotected in the first place came in *Roth v. United States*, 354 U.S. 476 (1957). This Court there suggested that constitutional free speech protections do not extend to obscenity because obscenity is "utterly without redeeming social importance," *Id.* at 484, *i.e.* worthless as expression. While such reasoning certainly may have permitted the government to suppress obscenity in situations far beyond those involving children or unwilling adults, it *also* effectively required a determination

that a work is "unqualifiedly worthless" before it can be deemed legally obscene. *A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney General*, 383 U.S. 413, 419 (1966)(plurality opinion)(internal quotation marks omitted). It thus imposed an unacceptably high burden on the government in obscenity prosecutions, *Miller v. State of California*, 413 U.S. 1, 22 (1973). In ultimately relaxing the extraordinarily speech-protective value prong from *Memoirs*, *see Miller* at 24-25 (substituting 'lacks serious . . . value" for "utterly without redeeming . . . value"), this Court necessarily abandoned the utter worthlessness reasoning from *Roth* and returned to *Chaplinsky's* understanding. Justice White had expressly charted this precise course in 1966, *Memoirs* at 461-62 (White, J., dissenting)(citing to *Chaplinsky* in order to avoid implications of *Roth*), and this Court deliberately followed him there seven years later, *Miller* at 25 n. 7 (citing to White, J.).

With *R.A.V.'s* refined understanding that the *reasons* which remove a category of expression from the presumptive constitutional protection also *limit* the purposes for which the government may regulate that category, these reasons become critical to full constitutional analysis. Because the only reasons this Court has ultimately accepted for considering obscenity to be beyond the First Amendment's protection are the welfare of children and the prevention of offense to unwilling adults, obscenity prosecutions must be restricted to situations implicating at least one of those concerns. This case concerns neither.

III. Louisiana May Not Try the Petitioners for Obscenity Because It Has Not Given Them Fair Notice of the Community Standards Which Properly Apply to a Determination of Obscenity Vel Non.

Under the First Amendment, the government – or anyone else alleging that expression is legally obscene – must bear the burden of proving that proposition by the appropriate quantum of proof. A three-part constitutional test governs all determinations of obscenity *vel non*. *Miller v. State of California*, 413 U.S. 15, 25-26 (1973). Furthermore, it is well settled that two of the prongs of the constitutional obscenity test are governed by so-called "contemporary community standards." *Cf. Pope v. State of Illinois*, 481 U.S. 497, 500-501 (1987). In this connection, the term "community" has always been overwhelmingly understood in an essentially geographical sense. Despite earlier suggestions that the First Amendment required a national community standard, this Court has deliberately held that states may adopt more localized communities as the source for standards in an obscenity analysis. *Miller* at 28.

It is thus clear that states such a Louisiana have some measure of choice in specifying the size of the communities whose contemporary values will govern obscenity determinations. As with other criminal law enforcement choices, however, constitutional due process considerations require that each state make its choices clear to all involved, *cf. Kolender v. Lawson*, 461 U.S. 352 (1983): particularly to speakers, publishers, and distributors of sexually explicit expression, to law enforcement officers who will be called upon to police the community, and to jurors who will be called up to make critical factual determinations about the values shared by the relevant community. An obscenity law regime which leaves unclear what community supplies the standards for evaluating expressive materials and

determining whether a speaker or publisher has broken the law suffers from all of the defects which properly doom any vague law. It leaves those subject to the laws simply unable to conform their conduct to the dictates of those laws. The uncertainly over laws carrying substantial criminal and quasi-criminal penalties will undoubtedly chill many into self-censorship. Furthermore, vague criminal standards leave law enforcement officials wih an inappropriate level of discretion in deciding when to attempt to enforce the law. Finally, uniform application of laws involving such matters as subjective taste or offensiveness is difficult enough to achieve. There can be little hope of any success at all if adjudicators and triers of fact are unclear about such a central feature of obscenity law.

Louisiana has left its law concerning the geographical community relevant for obscenity purposes so unclear as to impose a serious due process deprivation upon anyone whom it tries for obscenity. On the one hand, obscenity cases may be tried to a jury in Louisiana without any instruction concerning the geographical scope of the relevant community. *State v. Amato*, 343 So. 2d 698 (La. 1977). Indeed, this Court has expressly permitted such a procedure, but only to the extent that the government has determined that the relevant community coincides with the vicinage from which the jury is drawn. *Cf. Hamling v. United States*, 418 U.S. 87 (1974); *Jenkins v. State of Georgia*, 418 U.S.153 (1974). The problem in Louisiana is that making that adopting that very option can constitute reversible error. *State v. LeBlang*, 530 So. 2d 601 (4th Cir. 1988).

This situation raises the very serious possibility that Louisiana officials believe that they may enforce the state's obscenity laws without ever actually telling anyone what community actually supplies the constitutionally relevant standards. Such a position, of course, is no better than one

pressing for the enforcement of secret or *ex post facto* laws. But whether or not state officials actually seek to gain any advantage from the confusion which its courts have sown on this issue, it remains constitutionally impermissible to try these Petitioners for obscenity under these circumstances.

The courts below had every opportunity to resolve this confusion for the future. They uniformly declined those opportunities. But even a clear authoritative resolution of the confusion would not have allowed for a fair trial of these petitioners for conduct which occurred it the very midst of the confusion. Even one who knows the State of Louisiana well could not conform his or her conduct to the requirements of the state's obscenity laws without having some coherent idea about what community is relevant. And if the state's courts can articulate no clear idea, there is little doubt that those subject to the law can properly fathom its meaning.

CONCLUSION

For all of the foregoing reasons, the First Fourteenth Amendments prohibit the State of Louisiana from prosecuting the Petitioners for obscenity under the circumstances of this case. This Court shoud grant the instant Petition and issue a writ of certiorari to the Supreme Court of Louisiana in order to review the questions presented here.

Respectfully submitted,

J.D. OBENBERGER
Counsel of Record
REED LEE
J.D. Obenberger & Associates
70 West Madison Street
Suite 3700
Chicago, Illinois 60602
(312) 558-6427

WILLIAM L. GOODE
The Goode Law Firm
812 Johnston Street
Lafayette, Louisiana
70501

(337) 234-0600

Counsel for Petitioner

APPENDIX

Supreme Court of Louisiana
Docket No. 2006-KK-0583

State of Louisiana,
Respondent

-versus-

Le Video Stroe, Inc. and Emmette J. Jacob, Jr.
Petitioners.

ORDER

On the **5th day of May, 2006**, the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

* * *

WRIT APPLICATIONS DENIED:

* * *

2006-KK-0583 STATE OF LOUISIANA v. LE VIDEO STORE, INC. (Parish of St. Martin)

STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT

No: KW 05-01594

STATE OF LOUISIANA
VERSUS
LE VIDEO STORE, INC.

FILED 12/20/05

On application of Le Video Store, Inc. for Writ of Review in No. 228944 on the docket of the Sixteenth Judicial District Court, Parish of St. Martin, Hon. Charles Lee Porter.

Counsel for:
William Littlejohn Goode
J. D. Obenberger
Reed Lee
Le Video Store, Inc.

Counsel for:
Chester R. Cedars
Hon. J. Phillip Haney
State of Louisiana

Lake Charles, Louisiana, on February 2, 2006.

WRIT GRANTED AND MADE PEREMPTORY, IN PART; WRIT DENIED, IN PART: We find the trial court abused its discretion in ruling that the Defendants lacked standing to raise a claim that La.R.S. 14:106 is unconstitutional because it purports to extend criminal sanctions to activity conducted over the Internet and through interstate commerce. Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908 (1973); State v. Muschkat, 96-2922 (La. 3/4/98), 706 So.2d 429; State v. Love, 00-3347 (La. 5/23/03), 847 So.2d 1198. Accordingly, we remand the matter to the trial court for a ruling on the merits of the

Defendants' claim. As to the remaining claims, we find the trial court did not abuse its discretion in its denial of the Defendants' motion to dismiss.

/initials	/initials	/initials
SRC	JCP	JTG

16TH JUDICIAL DISTRICT COURT
PARISH OF IBERIA
STATE OF LOUISIANA

STATE OF LOUISIANA
VERSUS #228944
LE VIDEO, INCORPORATED

****

16TH JUDICIAL DISTRICT COURT
PARISH OF IBERIA
STATE OF LOUISIANA

STATE OF LOUISIANA
VERSUS #228945
EMMETTE JACOBS, JR.

****

16TH JUDICIAL DISTRICT COURT
PARISH OF IBERIA
STATE OF LOUISIANA

STATE OF LOUISIANA
VERSUS #228946

EDWARD BURLEIGH, JR.

JUDGMENT ON MOTIONS TO QUASH

On August 12, 2005, in St. Martinville, St. Martin Parish, Louisiana, Division "G," Sixteenth Judicial District Court, the parties in the above captioned matter appeared on motions to quash bills of information charging defendants, Le Video, Incorporated, Emmette Jacobs, Jr. and Edward Brumfield, Jr., with several counts of the criminal offense of obscenity under R. S. 14:106. At the conclusion of the hearing, the court took the matter under advisement. After due consideration of the evidence, arguments of counsel, and applicable law, the court publishes its reasons for judgment denying the motions to quash bills of information charging defendants with obscenity under R. S. 14:106.

APPEARANCES:

State of Louisiana, through J. Phil Haney, District Attorney for the 16" Judicial District, and Charles Foti, Attorney General for the State of Louisiana:

CHESTER CEDARS
ASSISTANT DISTRICT ATTORNEY
ST. MARTIN PARISH COURT HOUSE
SECOND FLOOR
ST. MARTINVILLE, LOUISIANA 70582

Defendants, Le Video, Incorporated, and Emmette J. Jacobs, Jr., through their attorneys of record:

J. D. OBENBERGER, ESQ.
PRO HOC VICE
3700 THREE FIRST NATIONAL PLAZA
70 WEST MADISON STREET
CHICAGO, ILLINOIS 60602

WILLIAM L. GOODE
THE GOODE LAW FIRM
812 JOHNSON STREET
P. O. DRAWER 3366
LAFAYETTE, LOUISIANA 70502

Defendant, Edward Burleigh, Jr. through his attorneys of record:

ALFRED BOUSTANY
THE BOUSTANY LAW FIRM
421 W. VERMILLION STREET
POST OFFICE BOX 4626
LAFAYETTE, LA

BACKGROUND

Under docket number 04-228944, the District Attorney filed a bill of information charging corporate Defendant, Le Video, Inc., on or about August 18 and 19, 2004 in the Parish of St.Martin, ". . . sold, rented, or otherwise distributed . . ." video tapes entitled "Sabrina's First Swing Party Orgy" and "Hardeore Climax" and a magazine entitled "Hustler Hardeore Unlimited" to an undercover police officer.[1] Under docket number 04-228945, the District Attorney filed a bill of information charging Emmette J. Jacobs, Jr., as the President of Le Video, Inc, on or about August 18 and 19, 2004 in the Parish of St. Martin ". . . sold, rented, or otherwise distributed . . ." the same videos and magazine as cited in the bill of information charging Le Video to an undercover police officer.[2]

[1]See Appendix A.
[2]See Appendix B

Under docket number 04-228946, the District Attorney filed a bill of information charging Edward Burleigh, Jr., as the owner of The Video Place, on August 18 and 19, 2004 in the Parish of St. Martin, ". . . sold, rented, or otherwise distributed. . ." video tapes entitled: "Deep Throat and Anal," "Sweet Ass Candy," "AN7B," and "Bootleg Bondage, Vol. 1" to an undercover police officer.[3] All bills of information allege ". . . the said items to be obscene and depicting and/or describing in a patently offensive manner hard core sexual conduct, and said items lack any literary, artistic, political, or scientific value." All Defendants entered pleas of not guilty to the bills of information.

Thereafter, all defendants filed motions to quash, dismiss and/or strike the bills of information on grounds Louisiana obscenity statute [R. S. 14:106[4]] violates the rights under the Due Process Clause of the Fifth Amendment to the United States Constitution applicable to the States through the Fourteenth Amendment and the rights to privacy and freedom of speech under a reading of the First Amendment to the United States Constitution and Article I, Sections 5 and 7 of the Louisiana Constitution (1974).

[3]See Appendix C.
[4]See Appendix D.

LEGAL ANALYSIS

OBSCENITY

In determining the constitutionality of a statute, the court must follow rules of statutory construction. A statute is presumed constitutional and the burden of establishing the opposite premise rests on the party attacking the statute. **State v. Newton**, 328 So.2d 110, 117 (La.1975). The rules of statutory construction favor upholding the constitutionality of a statute whenever possible. **State v. Griffin**, 495 So.2d 1306, 1308 (La.1986). Interpretation of Louisiana criminal statutes require ". . . genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision." **R.S. 14:3. R.S. 14:106 (Obscenity)** is presumed constitutional and will be upheld, unless it does not fit into the tenets of our constitution.

In **Miller v. California,** 41.3 U.S. 23, 93 S.Ct. 2607 (U.S. 1973) the defendant, a California based company, sent brochures through the mail to a California restaurant advertising adult magazines. The restaurant owner complained to the police considering the fact the brochures were unsolicited. The brochures consisted of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals prominently displayed. The U. S. Supreme Court set forth a three prong test for obscenity in Miller in the following discussion regarding obscenity:

> This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. Kois V. Wisconsin, 408 U.S. 229, 92 S.Ct. 2245, 33 L.Ed.2d 312 (1972); United States v. Reidel, 402 U.S., at 354, 91 S.Ct., at 1411-1412;

Roth v. United States, supra, 354 U.S., at 485, 77 S.Ct., at 1309. 'The First and Fourteenth Amendments have never been treated as absolutes (footnote omitted).' (Citations Omitted) We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See Interstate Circuit, Inc. v. Dallas, supra, 390 U.S., at 682--685, 88 S. Ct., at 1302 -1305. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value. (Emphasis Added)

CONTEMPORARY COMMUNITY STANDARDS

Defendants' argue the bills of information should be dismissed on grounds that the definition of obscenity provided under R.S. 14:106 is unconstitutional on the following grounds:

a) vagueness which fails to provide Defendants with notice that their conduct is proscribed and may be subject to criminal sanctions; and/or

b) the statute does not define which local community standards are to be applied in determining whether Defendants' conduct is obscene so that they may conform their conduct to that community's standards.

A penal statute is vague if it does not give a person of reasonable intelligence adequate notice that certain conduct is proscribed and punishable by law, and if it does not provide sufficient standards to the trier of fact by which guilt or innocence may be determined. **Kolender v. Lawson,** 461 U.S. 352, 358, 103 S. Ct. 1855, 1859, 75 L. Ed.2d 903 (1983); **State v. Azar,** 539 So.2d 1222, 1224(La.), cent. denied, 493 U.S. 823, 110 S. Ct. 82, 107 L.Ed.2d 48 (1989).

The U.S. Supreme Court has recognized that the most important aspect of the vagueness doctrine is the requirement that a legislature establish minimal guidelines to govern law enforcement. "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" **Kolender, supra,** citing **Smith v. Goguen,** 415 U.S. 566, 575, 94 S.Ct. 1242, 1248, 39 L.Ed.2d 605 (1974). Any law which essentially states that a person may stand on a public sidewalk or remain in a public place "only at the whim of any police officer of that city" carries with it an unacceptable and "ever-present potential for arbitrarily First Amendment liberties," and "bears the hallmark of a police state." **Shuttlesworth v. City of Birmingham,** 382 U.S. 87, 90, 86 S.Ct. 211, 213, 15 L.Ed.2d 176 (1965).

Defendants maintain that while **R.S.1 14:106** fairly elaborately and precisely catalogues all of the topological configurations of body parts that amount to hard core sexual conduct, it does not provide a definition of the applicable community standards. Defendants argue the failure to define the geographic area that forms the 'community' results in two evils. First, the lack of certainty or definition of "community" results in confusion; Second, without a definition of 'community,' law enforcement may bring charges and persons may be convicted without the applica-

tion of certain and established standards upon which to fix guilt. Defendant assert the legislature's failure to define the geographic area which forms the community is a failure to define the offense. Finally, Defendants contend that twenty nine states have defined "community standard" to avoid a constitutional challenge on grounds of vagueness.

The State of Louisiana responds that Louisiana courts have followed "contemporary community standard" as directed in Miller. Although, Louisiana has not defined community standard, as suggested by the Defendants, **R. S. 14:106** is still constitutional. Louisiana falls into the group of twenty one states without a definition of the term "community standard." Louisiana, as other similar situated jurisdictions, can overcome a vagueness challenge based on a lack of a "contemporary community standard" as framed in **Miller**.

In **Miller,** the U. S. Supreme Court held:

> Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive'hard core'sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and comercial activities may bring prosecution. See Roth v. United States, supra, 354 U.S., at 491--492, 77 S. Ct., at 1312--1313. Cf. Ginsberg v. New York, 390 U.S., at 643, 88 S. Ct., at 1282.

R.S. 14:106(3) tracts the language of Miller, supra, setting forth the third prong of the obscenity test as follows:

> A. The crime of obscenity is the intentional:
>
> (3)(a) Sale, allocation, consignment, distribution, dissemination, advertisement, exhibition, electronic communication, or display of obscene material, or the preparation, manufacture, publication, electronic communication, or printing of obscene material for sale, allocation, consignment, distribution, advertisement, exhibition, electronic communication, or display.
>
> (b) Obscene material is any tangible work or thing which the trier of fact determines that the average person applying contemporary community standards would find, taken as a whole, appeals to the prurient interest, and which depicts or describes in a patently offensive way, hard core sexual conduct specifically defined in Paragraph (2) of this Subsection, and the work or thing taken as a whole lacks serious literary, artistic, political, or scientific value.

Defendants were charged with selling, renting, or otherwise distributing videos and magazines, all of which possibly depicted hardcore sexual conduct as described in **R. S. 14:106**. **R. S. 14:106** gives several descriptions of possible examples of hardcore sexual conduct that may initiate a criminal prosecution. Louisiana obscenity statute gives the defendants, persons of reasonable intelligence, adequate notice that certain conduct is proscribed and punishable by law, and the statute further provides sufficient standards to the trier of fact by which guilt or innocence may be determined.

The court finds that the statute does not violate any rights of a citizen under the Due Process Clause of the 14th Amendment by failing to define an exact "community standard." Although, a Louisiana appellate court has found it unconstitutional to set a local community standard less than the whole state. **State v LaBlang,** 530 So.2d 601(La. App. 4th Cir.1998). In **Miller** and the cases following it, the United States Supreme Court has made it clear that a state may choose to define an obscenity offense in terms of "contemporary community standards" without further specification. Louisiana follows this pattern, permitting juries to rely on their understanding of the community standards of the geographic area from which they assemble to judge the controversy. Alternatively, a state may choose to define the standards in more precise geographical terms, as has been done in other jurisdictions. **Leblang; State v Amato,** 343 So.2d. 698(); **People v Tabron,** 544 P.2d. 380 (Co.1976); **Jenkins v. Georgia,** 418 U.S.153 (1974).

CONTENT BASE

Defendants maintain that R. S.14:106 is unconstitutional where it protects some potentially obscene material by providing a civil proceeding prior to prosecution, but proceeds straight to prosecution on other potentially obscene material.

La. R.S. 14:106(F) provides:

> F. (1) **Except for those motion pictures, printed materials, electronic communication and photographic materials showing actual ultimate sexual acts or simulated or animated ultimate sexual acts when there is an explicit,**

> **close-up depiction of human genital organs so as to give the appearance of the consummation of ultimate sexual acts,** no person, firm, or corporation shall be arrested, charged, or indicted for any violations of a provision of this Section until such time as the material involved has first been the subject of an adversarial hearing under the provisions of this Section, wherein such person, firm, or corporation is made a defendant and, after such material is declared by the court to be obscene, such person, firm, or corporation continues to engage in the conduct prohibited by this Section. The sole issue at the hearing shall be whether the material is obscene. (Emphasis Added)

The State of Louisiana responds that materials the Defendants are alleged to have disseminated fall within the category of materials presumed to be obscene, obviating the necessity for an adversarial hearing. Further, **R.S. 14:146** provides an adversarial hearing for possibly protected expression prior to a criminal prosecution. On the other hand, the same statute expedites the prosecution of obvious (presumptively) obscene materials. Such state action serves a legitimate, rational purposes and will overcome a constitutional content base argument. **State v. Louisiana Toy Company, Inc.** 483 So.2d 1264 (La. 1986) and **Pollick v Connick,** 596 F.Supp. 261 (E.D.La.1984).

In **Pollick,** plaintiffs' contend paragraph F(1) of **14:106** denies equal protection of the laws, because it grants a pre-arrest adversarial hearing, to determine if the material involved is obscene, to all purveyors of allegedly obscene material except those purveying material that shows "actual ultimate sexual acts or simulated or animated ultimate sexual acts when there is an explicit, closeup depiction of

human genital organs so as to give the appearance of the consummation of ultimate sexual acts." LSA-R.S. 14:106 F(1). The **Pollick** court disagreed, stating:

> The basic question before the Court is whether or not this disparate procedural treatment o^ purveyors of one type of obscene material and the purveyors of all other types of obscene material is supported by a sufficiently weighty governmental purpose and whether the means chosen in paragraph F(1) for achieving that purpose are sufficiently related to that end. Plaintiffs argue that this disparate *267 treatment must be analyzed under the strict scrutiny standard, because it impinges upon their fundamental first amendment rights of free speech and the press, and cannot withstand such scrutiny, because it serves no compelling governmental interest. This argument is without merit.
>
> Since obscenity statutes do impinge upon the fundamental rights of free speech and the press, the line between that material which is obscene and that material which is not obscene (i.e., between that which is not constitutionally protected and that which is constitutionally protected) must be very precisely drawn to serve the compelling governmental interest in safeguarding the public health, safety, and welfare against crime, antisocial behavior, and the other arguably ill effects o^ obscenity. See Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973). The Louisiana legislature has very precisely drawn that line by explicitly incorporating the *Miller* definition of obscenity.

Plaintiffs' equal protection challenge to paragraph F(1), however, does not concern the line between the obscene and the not obscene, between the constitutionally unprotected and the constitutionally protected. **Rather, the challenged legislative classification in paragraph F(1) procedurally divides the obscene from the arguably more obscene, neither of which is constitutionally protected.** Miller, 413 U.S. at 23, 93 S.Ct_ at 2614 ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment." *Id.*). Thus, this Court is not called upon to function in the role of guardian of the line against legislative encroachment on precious first amendment liberties, which role mandates and justifies judicial wielding of the burdensome strict scrutiny standard. Instead, the Court will give greater deference to the judgment of the legislature and test paragraph F(1) for mere rationality.

Applying the rational review standard, the Court finds that the disparate procedural treatment accorded by paragraph F(1) of LSA-R.S. 14:106 to purveyors of different types of obscene materials is constitutional. Paragraph F(1) provides a pre-arrest hearing in all instances of alleged obscenity offenses except when the offense charged is portrayal of ultimate sex acts "*when there is an explicit, closeup depiction of human genital organs so as to give the appearance of the consummation of ultimate sexual acts.*" (emphasis added). The exception created in paragraph F(1) enables the authorities to take immediate legal action against purveyors of material that the legislature has determined is blatently and presumptively obscene, without the delays inherent in a pre-arrest adversarial hearing, thereby minimizing public

harm. Simultaneously, paragraph F(1) helps to protect the first amendment rights of purveyors of material that is not blatently and presumptively obscene, that may arguably fall within the gray area straddling the border between the obscene and the not obscene, and that may arguably *268 not even be obscene at all. Thus, through paragraph F(1)'s disparate procedural treatment of purveyors of presumptively obscene material and purveyors of material that is not presumptively obscene, the legislature has attempted to achieve a rational balance between protection of the public health, safety and welfare and protection of individual rights. Moreover, the Court is unable to find that the legislature chose an irrational point for drawing the line between the presumptively obscene and the not presumptively obscene. The legislature could rationally have concluded that material showing ultimate sexual acts with explicit, closeup depictions of the genitals and giving the appearance of consummation of ultimate sexual acts was blatently and presumptively obscene, while concluding that the other types of hard core sexual conduct described in LSA-R. S.14:106 A(2)(b) were not blatently and presumptively obscene. That the legislature might have drawn the line more rationally is of no moment. So long as the legislative classification at issue bears some fair relationship to a legitimate public purpose, as paragraph F(1) clearly does here, this Court is not free to substitute its judgment for that of the legislature. Accordingly, the Court rejects plaintiffs' contention that LSA-R.S. 14:106 F denies them the equal protection of the laws.

The court finds the defendant's content base argument similar to the argument in Pollick. In Pollick, the court

found the both materials, those presumptively obscene and those not presumptively obscene, to be unprotected speech. In conclusion, **R. S. 14:106** establishes a distinction in legal procedure between sexual acts that are presumptively obscene and those not presumptively obscene. This legal distinction bears some fair rational relationship to a legitimate public purpose. This court finds the Defendants' argument does not have merit and the constitutional challenge is dismissed.

THE FIRST AMENDMENT RIGHT TO PRIVACY

Defendants maintain R. S. 14:106 is constitutionally invalid where it violates a person's right to privacy. Defendants allege the statute fails to allege the Defendants exposed obscenity to minors or unwilling adults. Defendant assert that states are forbidden from regulating, on the basis of content, sexually explicit expression which is confined to consenting adults, whether or not it is legally obscene, whether it is already in the home or distributed through discrete commercial channels.

In **Lawrence v Texas,** 539 U.S. 558, (2003), Defendants, two males, were charged with illegally engaging in consensual acts of sodomy in the privacy of their own home. Defendants contested the Texas statute prohibiting sodomy between individuals of the same sex is unconstitutional. They challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment and a similar provision of the Texas Constitution. The United States Supreme Court found:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where

consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." Casey, supra, at 847, 112 S. Ct. 2791. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

In **Lawrence v. Texas**, the issue before the U.S. Supreme court was the validity of a state statute making it a crime for two persons of the same sex to engage in

certain intimate sexual conduct. **Bowers v Hardwick**, 478 U.S. 186, (1986) was the landmark case on sodomy before **Lawrence. Id.** The United States Supreme Court in **Bowers** found it constitutional to penalize persons who commit consensual acts of sodomy.

Defendants argue the courts have seriously undercut any legitimate rationale for treating commercial distribution of obscenity differently from the private possession which has long been recognized as constitutionally protected, citing **Stanley v. Georgia,** 394 U.S. 557 (1969). The states can legitimately regulate obscenity, like other "well defined and narrowly limited classes of speech" recognized under **Chaplinsky v. State of New Hampshire**, 315 U.S. 568 (1992), only for the specific reasons why it has been recognized as a constitutionally "unprotected" category of expression, as in **R.A.V. v. Minnesota,** 505 U.S. 377 (1992).

The State's opposition is that the right to engage in private sexual conduct is not elevated to the right to distribute obscene material under **Lawrence.** Further, the constitution is not abridged by **R. S.14:106**, citing **State v. Honore**, 564 So.2d 345 (La. 5`h Cir.1990) and **State v. Brenan,** 772 So.2d 64 (La.2000). The court must determine whether **Lawrence** renders R. S. 14:106 unconstitutional under the First Amendment, as applicable to states through the 14th Amendment.

In **State v. Honore**, Defendants, owners of Airline Book Store, sold magazines containing obscene materials to an undercover police officer. Defendants were charged with violating **R.S. 14:106**. Defendants filed motions to quash arguing **R.S.14:106** constitutionally violates a person's right to privacy. More specifically, the defendant argued, as applied to the seller of magazines for private

viewing, **R.S. 14:106** functionally prevents the acquisition of presumptively obscene material for private use in one's home and constitutes an unconstitutional invasion of the right to privacy. Louisiana Fourth Circuit Court of Appeal denied the defendant's motion, stating:

> RIGHT TO PRIVACY
>
> Defendant alleges that LSA-R.S. 14:106 unconstitutionally infringes on the right to privacy guaranteed by Article 1, Section 5 of the Louisiana Constitution of 1974. More specifically, defendant argues that, as applied to the seller of magazines for private viewing, LSA-R.S. 14:106 functionally prevents the acquisition of presumptively obscene material for private use in one's home and constitutes an unconstitutional invasion of the right to privacy.
>
> Defendant argues that because the Louisiana Constitution provides greater protection for individual rights than that provided by the Fourth Amendment of the U.S. Constitution, U.S. v. 12 200 Ft. Reels of Super 8 MM Film, 413 U.S. 123, 93 S. Ct. 2665, 37 L. Ed.2d 500 (1973), is distinguishable and not controlling as a matter of State Constitutional Law. We disagree with defendant and believe the holding of the U.S. Supreme Court as stated at 413 U.S. at p. 126, 93 S.Ct. at p. 2668, is the controlling Louisiana Law:
>
> "Claimant relies on the First Amendment and our decision in Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). But it is now well established that obscene material is not protected by the First Amendment. Roth v. United States, 354 U.S. 476, 485, 77 S.Ct. 1304, 1309, 1 L.Ed.2d 1498 (1957), reaffinned today in Miller v. California, 413

U.S. 15, at 23, 93 S.Ct. 2607, at 2614, 37 L.Ed.2d 419. As we have noted in United States v. Orito, 413 U.S. 139, at 141-143, 93 S.Ct. 2674, at 2677-2678,37 L.Ed.2d 513, also decided today, Stanley depended, not on any First Amendment right to purchase or possess obscene materials, but on the right to privacy in the home. Three concurring Justices indicated that the case could have been disposed of on Fourth Amendment grounds without reference to the nature of the materials. Stanley v. Georgia, supra, 394 U.S., at 569, 89 S.Ct., at 1250 (Stewart, J., joined by Brennan and White, JJ., concurring).

In particular, claimant contends that, under *Stanley*, the right to possess obscene material in the privacy of the home creates a right to acquire it or import it from another country. This overlooks the explicitly narrow and precisely delineated privacy right on which *Stanley* rests. That holding reflects no more than what Mr. Justice Harlan characterized as the law's 'solicitude to protect the privacies of the life within [the home].' Poe v. Ullman, 367 U.S. 497, 551, 81 S.Ct. 1752, 1781, 6 L.Ed.2d 989 (1961) (dissenting opinion).

We are not disposed to extend the precise, carefully limited holding of *Stanley* to permit importation of admittedly obscene materials simply because it is imported for private use only. To allow such a claim would not be unlike compelling the Government to permit importation of prohibited or controlled drugs for private consumption as long as such drugs are not for public distribution or sale. We have already indicated that the protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give

> it to others. United States v. Thirty-Seven Photographs, supra, 402 U.S., [363] at 376, 91 S.Ct., [1400] at 1408 [28 L.Ed.2d 822 (1971)] (opinion of White, J.), and United States v. Reidel, supra, 402 U.S., [351] at 355, 91 S.Ct., [1410] at 1412 [28 L.Ed.2d 813 (1971)]. Nor is there any correlative right to transport obscene material in interstate commerce. United States v. Orito, supra, 413 U.S., [1391 at 142-144, 93 S.Ct., [2674] at 2677-2678 [37 L.Ed.2d 513 (1973)]. It follows that *Stanley* does not permit one to go abroad and bring such material into the country for private purposes. '*Stanley's* emphasis was on the freedom of thought and mind in the privacy of the home. But a port of entry is not a traveler's home.' United States v. Thirty-Seven Photographs, supra, 402 U.S., at 376, 91 S.Ct., at 1408 (opinion of White, J.)." [Footnotes Omitted. Emphasis added].
>
> Thus, although one may have the right to possess and view obscene material in the privacy of his home, this right does not equate to a right to acquire the obscene material.

In this case, the Defendants were charged with selling, renting, or otherwise distributing videos and magazines, all of which possibly depicted hardcore sexual conduct, to undercover police officers. The court finds although one may have the right to possess and view obscene material in the privacy of his home, this right is not elevated to publicly trading or selling obscene material. All motions to quash filed by the several defendants, Le Video, Incorporated, Enmnette Jacobs, Jr. and Edward Burleigh, Jr., are denied and/or overruled.

INTERNET TRANSACTIONS

Defendants argue that R.S. 14:106 is constitutionally overbroad where it violates Article 1, Section 8 of the United States Constitution, known as the Commerce Clause. More particularly, Defendants contest that R.S. 14:016(A) as overbroad because the statute seeks to "reach the dissemination of pictorial depictions and other expression communicated over the Internet in interstate and international commerce." The statute further seeks to apply a local community standard to interstate commerce.

The bill of information does not contain allegations of which implicated defendant trading or selling obscene materials over the internet. The court has already denied Defendants contemporary community standards argument, content base argument and the right to privacy argument. R. S. 14:106 constitutionally applies to the defendant's conduct. The court finds the Defendants lack standing to bring a Article 1, Section 8 (Commerce Clause) argument.

Read and signed in the City of St. Martinville, St. Martinville Parish, Louisiana on the 5th day of October, 2005.

s/ Charles L. Porter

CHARLES L. PORTER
DISTRICT JUDGE

OPPOSITION BRIEF

(2)

No. 06-198

Supreme Court, U.S.
FILED
SEP 6 - 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

EMMETTE J. JACOB, JR. and
LE VIDEO STORE, INC.,

Petitioners,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Louisiana

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHESTER R. CEDARS
Counsel of Record
Assistant District Attorney
St. Martin Parish Courthouse,
2nd Floor
St. Martinville, LA 70582
337.394.2220
Attorney for Respondent,
State of Louisiana

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF APPENDICES	ii
TABLE OF AUTHORITIES	iii
LOUISIANA STATUTES INVOLVED	1
COUNTER STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
I. Petitioners have no constitutional right to distribute obscene materials even though the recipients thereof are "consenting adults"	5
A. The commercial distribution of obscene material enjoys no veil of constitutional protection	5
B. A state's interest in prohibiting the commercial distribution of obscene materials is not limited to the protection of children and non-consenting adults	7
C. There have been no recent constitutional developments that restrict the regulation of the commercial distribution of obscenity solely to protect children and non-consenting adults	9
II. La.R.S. 14:106 provides fair and sufficient notice of the conduct which it prohibits. Thus, the statute is not unconstitutionally vague for failure to define the "community" whose standards determine those works which appeal to the prurient interest and which are patently offensive	16
CONCLUSION	21

TABLE OF APPENDICES

Appendix A La.R.S. 14:106 .....App. 1

TABLE OF AUTHORITIES

Page

CONSTITUTION

First Amendment to the United States Constitution.....*passim*

Fourteenth Amendment to the United States Constitution..... 13, 21

LSA-Const.Art. I, §16..... 20

STATUTES

La.R.S. 14:106 .....*passim*

La.R.S. 14:106(A)(2)(b)..... 2

La.R.S. 14:106(A)(3) 2

La.R.S. 14:106(A)(3)(b)..... 17

CASES

Buckley v. Valeo, 424 U.S. 1 (1976) 3

Jenkins v. Georgia, 418 U.S. 153 (1974)..... 18, 20

Kois v. Wisconsin, 408 U.S. 229 (1972) 7

Lawrence v. Texas, 539 U.S. 558 (2003).....*passim*

Memoirs v. Massachusetts, 383 U.S. 413 (1996)..... 7

Miller v. California, 413 U.S. 15 (1973).....*passim*

Minneapolis Star & Tribune Company v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983)..... 3

Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973)..... 7, 9, 10, 12

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)..... 11

Redrup v. State of New York, 386 U.S. 767 (1967)..... 7

TABLE OF AUTHORITIES – Continued

Page

Roth v. United States, 354 U.S. 476 (1957) 6

Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 502 U.S. 105 (1991) 3, 11

Stanley v. Georgia, 394 U.S. 557 (1969) 8, 9

State v. Amato, 343 So.2d 698 (La. 1977) 19

State v. Burch, 365 So.2d 1263 (La. 1978) 19

State v. Davis, 457 So.2d 91 (La.App. 4th Cir. 1984) 19

State v. LeBlang, 530 So.2d 601 (La.App. 4th Cir. 1988) 19, 20

State v. Wrestle, Inc., 360 So.2d 831 (La. 1978) 19

United States v. 12 200-Foot Reels, 413 U.S. 123 (1973) 9

United States v. Orito, 413 U.S. 139 (1973) 9

United States v. Reidel, 402 U.S. 351 (1971) 8

United States v. Thirty-Seven (37) Photographs, 402 U.S. 363 (1971) 8

Williams v. Attorney General of Alabama, 378 F.3d 1232 (11th Cir. 2004) 14

MISCELLANEOUS

Rule 14.1(f) of the Rules of the Supreme Court of the United States 1

Rule 24.2 of the Rules of the Supreme Court of the United States 1

LOUISIANA STATUTES INVOLVED

Petitioners correctly cite the constitutional provisions which are implicated in this case. However, the Louisiana criminal statute which is assailed by petitioners, La.R.S. 14:106, is merely referenced in the extent application for the Writ of Certiorari. Consequently, for the Court's edification and easy reference, the entire text of that statute is reproduced in this response memorandum in Appendix A.[1]

COUNTER STATEMENT OF THE CASE

The Statement of the Case submitted by petitioners is, essentially, correct. However, several factual matters which will more accurately establish the landscape surrounding the extant prosecution have not been set forth. Thus, the State of Louisiana supplements petitioners' Statement of the Case as follows.[2]

Petitioner, EMMETTE J. JACOB, JR., is the President of an "adult" video store, LE VIDEO STORE, INC. The business is located in rural St. Martin Parish, Louisiana, and deals, exclusively, in the commercial distribution of materials generally recognized as pornographic. On December 6, 2004, the Office of District Attorney for the Sixteenth Judicial District, State of Louisiana, filed Bills

[1] See Rules 14.1(f) and 24.2 of the Rules of the Supreme Court of the United States.

[2] These facts were outlined and argued in detail in the memoranda filed with the state courts in connection with petitioners' motion to quash, the denial of which is the basis for this Petition for Writ of Certiorari. None of these factual observations are in dispute.

of Information charging both petitioners with multiple counts of violations of La.R.S. 14:106.[3] Specifically, respondent, the STATE OF LOUISIANA, charges that petitioners, through their employees and with their knowledge, consent, and approval "sold, rented, or otherwise distributed" two (2) videos and a magazine, all of which depicted hardcore sexual conduct as statutorily defined by La.R.S. 14:106(A)(2)(b). The misdeeds of petitioners particularly challenged by the STATE OF LOUISIANA directly address the provisions of La.R.S. 14:106(A)(3).

The procedural account in the state courts set forth in the Petition for Writ of Certiorari on page 3 is accurate and merits no additional comment or clarification.

REASONS FOR DENYING THE WRIT

Respondent, through undersigned counsel, respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari urged by petitioners. La.R.S. 14:106, the state statute challenged in the instant petition, has been drafted in strict compliance with the instructions of this Honorable Court. See *Miller v. California*, 413 U.S. 15, 24 (1973). Hence, this statute does not offend any constitutional principle, but rather reflects in exacting detail every single mandate which has emanated from this Honorable Court to insure that the regulation of the commercial distribution of obscene materials does not trespass upon the First Amendment.

[3] This statute is reproduced in Appendix A.

The jurisprudence cited by petitioners which, on First Amendment grounds, restricts the government's right to regulate activities related to matters such as campaign contributions, is not germane to the issues implicated in their prosecution in the case at bar. Moreover, the jurisprudential edicts relied upon by petitioners do not cripple this Honorable Court's prior, legitimate distinctions between the right to possess obscene material and the right, and indeed obligation, of the state to restrict the commercial distribution thereof.[4] The fundamental flaw in petitioners' argument that "constitutional developments" subsequent to this Court's decision in *Miller v. California*, supra, have established a "free speech barrier to governmental attempts to ban or substantially burden commerce in expression", inclusive of obscene materials, is the fact that obscenity is without any political, social, or cultural value; thus, obscenity falls beyond the reach of the First Amendment. As such, contrary to petitioners' posture in this case, materials which are deemed obscene cannot and should not be accorded the sanctity of the expression afforded to the conduct which was analyzed by this Court in the cases relied upon by petitioners.

Furthermore, petitioners' argument that this Honorable Court and other federal and state jurisprudence have

---

[4] In support of their proposition that constitutional developments have abated such distinctions, petitioners cite cases such as *Buckley v. Valeo*, 424 U.S. 1 (1976), *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991), and *Minneapolis Star & Tribune Company v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). However, none of these decisions address the dissemination of obscene materials nor do they embellish any notion that inherent in a free speech environment is the right to distribute obscene items.

deemed it necessary to regulate obscene materials is limited solely to the protection of unwilling adults and children is simply incorrect. This Court has specifically defined a myriad of public interests which impel the government to regulate the distribution of **obscene items**. However, in so doing, the state, according to the dictates of this Court, must be wary of narrowly categorizing materials so as not to infringe upon the sanctity of the right of expression inherent in the First Amendment. Therefore, any attempt by the state to address the distribution of obscenity must comport with the constitutional parameters first set forth in *Miller v. California*, supra. As alluded to previously in this disquisition, La.R.S. 14:106 reflects a valid exercise of the state's ability to regulate obscenity since the text of the statute was drawn in strict accordance with the pronouncements of this Court.

Petitioners also contend that privacy interests and the right of free expression under the First Amendment "constitutionally blend together" so intimately that the state may not validly regulate the distribution of materials deemed obscene. Specifically, petitioners argue that the ambit of *Lawrence v. Texas*, 539 U.S. 558 (2003) envelops the concept that the government may not prevent the distribution of obscene materials to consenting adults who choose to make such items a part of their private sexual pursuits. Respondent maintains that neither *Lawrence v. Texas*, supra, nor any other jurisprudence translates any **perceived** constitutional right to engage in private sexual conduct into a constitutional right to publicly distribute obscene materials.[5] Any such interpretation or application

[5] Respondent does not concede that *Lawrence v. Texas*, supra, recognizes a specific constitutional right to sexual intimacy. Rather, the

(Continued on following page)

of this Court's proclamations in *Lawrence v. Texas*, supra, would be strained and unreasonable. Simply put, there is no constitutional basis upon which one can equate the right of privacy with the authority of the state to regulate the commercial distribution of obscene materials to anyone including "consenting adults".

La.R.S. 14:106 is a valid rumination of the constitutional parameters which are inherent in decisions rendered by this Honorable Court. There is no reason to reexamine this Court's edicts relative to a state's right to prohibit the commercial distribution of materials deemed obscene. Consequently, the efforts of the STATE OF LOUISIANA to insure that La.R.S. 14:106 comports with *Miller v. California*, supra, and its progeny should be embraced by a denial of the extant Petition for Writ of Certiorari.

I. Petitioners have no constitutional right to distribute obscene materials even though the recipients thereof are "consenting adults".

A. The commercial distribution of obscene material enjoys no veil of constitutional protection.

This Court has repudiated the notion that obscenity falls within the purview of protected speech under the First Amendment, concluding that implicit in the history of that constitutional precept is the fact that obscenity is

---

STATE OF LOUISIANA submits that Texas's anti-sodomy statute successfully challenged in *Lawrence v. Texas* was deemed invalid under a rational-basis review. No specific constitutional right of sexual intimacy was recognized by this Honorable Court's decision.

without redeeming social value or import. *Roth v. United States*, 354 U.S. 476 (1957); *Miller v. California*, supra. Especially salient are these observations of this Court:

> "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. *Kois v. Wisconsin*, 408 U.S. 229 (1972); *United States v. Reidel*, 402 U.S. at 354; *Roth v. United States*, supra at 485 . . . The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a 'misuse of the great guarantees of free speech and free press . . . ' *Breard v. Alexandria*, 341 U.S. at 645. The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. 'The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth v. United States*, supra, at 484 (emphasis added). See *Kois v. Wisconsin*, 408 U.S. at 230-232; *Thornhill v. Alabama*, 310 U.S. at 101-102. ***But the public portrayal of hardcore sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.***" (Emphasis supplied)

Miller v. California, 413 U.S. at 23, 34-35.

B. A state's interest in prohibiting the commercial distribution of obscene materials is not limited to the protection of children and non-consenting adults.

To fully digest the arguments espoused by petitioners, it is of extreme import to note that this Court has consistently, unequivocally, and unwaveringly acknowledged that the states have a legitimate interest in prohibiting the dissemination of obscene materials. *Memoirs v. Massachusetts*, 383 U.S. 413 (1996); *Redrup v. State of New York*, 386 U.S. 767 (1967); *Kois v. Wisconsin*, 408 U.S. 229 (1972). Of grave significance in this regard are these sage remarks by this Court in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) wherein the following specific governmental interests were acknowledged as valid bases for prohibitions against the distribution of obscene materials:

1. "In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby . . . These include the interest of the public in the quality of life and total community environment, the tone of commerce in the great city centers, and possibly, the public safety itself." 413 U.S. at 57-58.

2. "Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature . . . could quite reasonably determine that such a connection does or might exist. In deciding *Roth*, this Court implicitly decided that a legislature could legitimately act on such a

conclusion to protect 'the social interest in order and morality'." 413 U.S. at 60-61.

3. "The sum of experience . . . affords an ample basis for legislatures to conclude that a sensitive, key relationship to human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence on empirical data." 413 U.S. at 63.

4. "As Mr. Chief Justice Warren stated, there is a 'right of the nation and of the states to maintain a decent society'." 413 U.S. at 69.

Against the foregoing backdrop, respondent rejects and challenges as erroneous petitioners' conclusion on page 9 of their petition that, " . . . all of the Justices' concerns about commerce focused almost exclusively on a concern that obscenity might be exposed to minors or unwilling adults." Such a hypothesis is offensive to the myriad of reasons this Court has embraced and endorsed supporting the prohibition against the dissemination of obscenity. The STATE OF LOUISIANA does not, in the context of this case, challenge the principle that the mere private possession of obscene materials is entitled to constitutional protection. See *Stanley v. Georgia*, 394 U.S. 557 (1969). Nevertheless, respondent maintains that this Court has declined to extend the protection of *Stanley v. Georgia*, supra, to the commercial distribution of materials deemed obscene by the application of the test enunciated in *Miller v. California*, supra. See *United States v. Reidel*, 402 U.S. 351 (1971); *United States v. Thirty-Seven (37)*

Photographs, 402 U.S. 363 (1971); *United States v. 12 200-Foot Reels*, 413 U.S. 123 (1973); *United States v. Orito*, 413 U.S. 139 (1973); and *Paris Adult Theatre I v. Slaton*, supra.[6]

C. There have been no recent constitutional developments that restrict the regulation of the commercial distribution of obscenity solely to protect children and non-consenting adults.

Petitioners advance the proposition that several decisions from this Court since 1973 have eroded any viable distinction between the expression *simpliciter* and commerce in expression. Essentially, petitioners postulate that there is no longer a valid reason to distinguish between the right to possess with the right to distribute. However, not one single decision relied upon by petitioners in support of this supposition addresses the dissemination of obscene materials which implicate the well recognized state interests as set forth in *Paris Adult Theatre I v. Slaton*, supra. Rather, the cases cited by petitioners in support of their arguments that " . . . several important constitutional developments . . . have thoroughly undercut any viable distinction between expression *simpliciter* and commerce in expression"[7] focus upon the state's regulation of campaign contributions and similar expressions which

---

[6] Indeed, on pages 8-9 of their writ application, petitioners concede that this Court, subsequent to *Stanley v. Georgia*, supra, " . . . expressly and deliberately refused to extend similar constitutional protection to the commercial distribution which is necessary – as a practical matter – to enable the private possession of obscene expression."

[7] See page 9 of Petition for Writ of Certiorari.

fall wholly within the realm of political expression. No single case or argument interposed by petitioners adulterates the state's interests in the regulation of obscenity as defined in *Paris Adult Theatre I v. Slaton*, supra.

Respondent asserts that expression in the context of political speech does not equate to the commercialized activities of the purveyors of obscene materials. Although the petitioners seem to object to the separation of one's First Amendment rights to participate in the political process via campaign contributions from the state's recognized interests in regulating the dissemination of obscene materials, such a distinction is indeed permissible, warranted, common sensible, and more importantly, constitutionally appropriate. To argue that the protection of political speech under the First Amendment, and other political activities for that matter, can and should be equated with the dissemination of obscene materials is an affront to this Court's edicts. These pertinent observations of this Court in *Miller v. California*, 483 U.S. at 23, 34-36, merit repeating:

> "But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a 'misuse of the great guarantees of free speech and free press . . . ' The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent." (Citations omitted).

Petitioners' reliance upon *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) should afford them little comfort in their arguments before this Court. In that action, a Minnesota statute prohibiting the display of a symbol which "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" was found violative of the First Amendment. This Court declared that the statute went beyond mere content and infringed upon actual viewpoint discrimination. As regards La.R.S. 14:106 and the obscene materials which satisfy the *Miller* test, no viewpoint issues are involved in the case at bar. Rather, the statute prohibits the distribution of materials which this Court has found to meet certain criteria and therefore to be without any social, political, or educational value.

Likewise, petitioners' dependence upon *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991) is equally infirm. In that case, this Court found as inconsistent with the First Amendment a statute which deprived convicts of the right to receive compensation for published accounts of their crimes. Essentially, this Court acknowledged that the statute imposed content-based restrictions by virtue of prohibiting financial incentives for the exercise of First Amendment expression. However, as with the campaign finance cases cited by petitioners, the *Simon & Schuster*, supra, decision did not center on the type of "expression" called into question in the instant matter – obscenity.

La.R.S. 14:106, the obscenity statute under attack in this case, simply prohibits the distribution of materials, for commercial gain or otherwise, which this Honorable Court has found to meet specific criteria and, therefore, to be without any social, political, or educational value. The core principles upon which *Miller v. California*, supra, and

its progeny are premised, and the constitutional basis upon which La.R.S. 14:106 was enacted, have not been diminished by any jurisprudential declaration addressing political speech and **legitimate** First Amendment activities which involve some sort of protected viewpoint expression.

Therefore, there is no constitutional right to distribute obscene materials to any **consenting adult** or anyone else for that matter. The constitutional distinction between the right to possess obscene materials and the prohibition against the distribution thereof has not been eroded by any of the jurisprudence relied upon by the petitioners. The considerations which this Court long ago validated as proper reasons for regulating obscenity remain undisturbed. Furthermore, those considerations embrace justified concerns which protect not only children and non-consenting adults, but also the community's "social interest in order and morality". *Paris Adult Theatre I v. Slaton*, supra at 60-61.

Moreover, the petitioners' attempt to justify the right to disseminate obscene materials, as defined by this Court and La.R.S. 14:106, on the basis of the right of privacy is also clearly misplaced. In this connection, the petitioners assert on page 4 of their writ application that:

> " . . . those same [privacy] interests protect adults in choosing to make even legally obscene pornography a part of their own private, intimate sexual activities, *cf. Stanley v. State of Georgia*, 394 U.S. 557, 568 (1969), whether those activities are solitary or involve another consenting adult. So it is clear that constitutional privacy protections limit the permissible scope of obscenity statutes even if those statutes fit comfortably within the

> obscenity exception to the First Amendment's free speech clause."

These conclusory comments urged by petitioners are premised upon *Lawrence v. Texas*, supra. Respondent submits that petitioners' attempt to extend the reach of that case constitutes judicial apostasy.

In *Lawrence v. Texas*, supra, this Court invalidated on constitutional grounds the anti-sodomy laws of the State of Texas. In reversing the defendant's conviction in that case, this Honorable Court recognized "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex". *Lawrence*, 539 U.S. at 572. The majority decision was premised upon the liberty interests found in the substantive component of the due process clause of the Fourteenth Amendment to the United States Constitution. See *Lawrence*, 539 U.S. at 564. Nonetheless, of grave import is the majority opinion's admonition that the reader repel the temptation to extend the decision beyond the "realm of personal liberty which the government may not enter". *Lawrence*, 539 U.S. at 578:

> "The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution." *Id.*

With *Lawrence v. Texas*, supra, as its bulwark, petitioners submit that a person's liberty interests/privacy rights are so broad as to embrace the right to use obscene materials as part of one's sexual activities, whether with

another adult or alone. Petitioners, therefore, invite this Honorable Court to constitutionally legitimize the dissemination of obscene materials so that the alleged constitutional right to use same in private sexual endeavors will not be compromised.

Respondent, the STATE OF LOUISIANA, submits that no aspect of *Lawrence v. Texas*, supra, impacts the validity of La.R.S. 14:106 when measured against any constitutional concept. Significantly, what petitioners fail to acknowledge and recognize is that La.R.S. 14:106 does not in any way prohibit the private possession of obscene materials which is protected under *Stanley v. Georgia*, supra. As previously noted herein, this right, however, does not extend to and/or encapsulate the commercial distribution of obscene materials. The right to possess, therefore, is not tantamount to the right to distribute. No aspect of *Lawrence v. Texas*, supra, can logically be viewed to consecrate a right to distribute obscene materials solely because that decision **may** be seen by some to have created a right to engage in private sexual conduct.

Of significant guidance to this Honorable Court is the recent decision of *Williams v. Attorney General of Alabama*, 378 F.3d 1232 (11th Cir. 2004) wherein a constitutional challenge was rejected relative to an Alabama statute which barred the commercial distribution of "sex toys". The Alabama edict was challenged on the basis that through its prohibition of the commercial distribution of sex devices, the State of Alabama had intruded into the most intimate of places, the bedrooms of its citizens, in violation of *Lawrence v. Texas*, supra. However, the Eleventh Circuit in rejecting that proposition, astutely observed that:

> "The Supreme Court's most recent opportunity to recognize a fundamental right to sexual privacy came in *Lawrence v. Texas*, where petitioners and *amici* expressly invited the court to do so. That the *Lawrence* court had declined the invitation was this Court's conclusion in our recent decision in *Lofton v. Secretary of Department of Children and Family Services*, 358 F.3d 804, 815-816 (11th Cir. 2004). In *Lofton*, we addressed in some detail the 'question of whether *Lawrence* identified a new fundamental right to private sexual intimacy.' We concluded that although *Lawrence* clearly established the unconstitutionality of criminal prohibitions on consensual adult sodomy, 'it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right' – whether to homosexual sodomy specifically or, more broadly, to all forms of sexual intimacy. *Id.* at 817. We noted in particular that the *Lawrence* opinion did not employ fundamental-rights analysis and that it ultimately applied rational-basis review, rather than strict scrutiny, to the challenged statute."

The 11th Circuit went further and declared:

> "If we were to accept the invitation to recognize a right to sexual intimacy, this right would theoretically encompass such activities such as prostitution, obscenity, and adult incest – even if we were to limit the right to consenting adults."

Therefore, respondent submits that "consenting adults" have not been awarded a license to publicly and/or commercially distribute and/or receive obscene materials under *Lawrence v. Texas*, supra, despite the baseless claims of the petitioners to the contrary. Additionally, there has been no erosion of the entrenched premises upon

which this Court has permitted the regulation of the dissemination of obscene materials as specifically defined by *Miller v. California*, supra. Simply put, the right of privacy recognized in *Lawrence v. Texas*, supra, does not embrace the public and/or commercial dissemination of obscene materials. Likewise, the legitimate, well-recognized rationale for regulating the distribution of obscene materials remains unaffected by any jurisprudential edicts from this Honorable Court, or any other court for that matter. Attempts to equate obscene materials with protected free speech expressions or protected private conduct cannot survive constitutional scrutiny.

II. La.R.S. 14:106 provides fair and sufficient notice of the conduct which it prohibits. Thus, the statute is not unconstitutionally vague for failure to define the "community" whose standards determine those works which appeal to the prurient interest and which are patently offensive.

In the instant writ application, petitioners assert that La.R.S. 14:106 is unconstitutionally vague because the "community" whose contemporary standards govern obscenity determinations is not specifically defined, geographically or otherwise. The gravamen of petitioners' arguments is, essentially, stated on page 22 of their petition:

> "Louisiana has left its law concerning the geographical community relevant for obscenity purposes so unclear as to impose a serious due process deprivation upon anyone whom it tries for obscenity."

Respondent contends that this assertion has been considered and rejected by the jurisprudence of this country, inclusive of the State of Louisiana, and therefore injects no novel issue.

This Honorable Court in *Miller v. California*, supra, established a three-prong test for assessing whether a "work" is obscene and, therefore, unprotected by the First Amendment:

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

Miller v. California, 413 U.S. at 24.

As a mere perusal will reflect, La.R.S. 14:106 is, fundamentally, almost a verbatim recitation of those criteria developed by this Court in the *Miller* decision for evaluating materials to determine whether they are "obscene" and thus without First Amendment guardianship. In no uncertain terms, La.R.S. 14:106 prohibits the dissemination of materials that, in part, are determined to appeal to the prurient interest and are patently offensive, as measured against contemporary community standards.[8] In the extant writ application, petitioners assert that because the "community" from which the standards at

---

[8] See La.R.S. 14:106(A)(3)(b).

issue emanate is not defined, La.R.S. 14:106 is unconstitutionally vague.

There is no constitutional charge that a sovereign define, geographically or otherwise, the perimeters of the community whose standards must be ascertained by the trier of fact in assessing whether specific publications or productions meet the *Miller* test. Indeed, in *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974), this Honorable Court aptly commented:

> "We agree with the Supreme Court of Georgia's implicit ruling that the Constitution does not require that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community. *Miller* approved the use of such instructions; it did not mandate their use. What *Miller* makes clear is that state juries need not be instructed to apply 'national standards'. We also agree with the Supreme Court of Georgia's implicit approval of the trial court's instructions directing jurors to apply 'community standards' without specifying what 'community'. *Miller* held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to contemporary community standards, and the States have considerable latitude in framing statutes under this element of the *Miller* decision. **A state may choose to define an obscenity offense in terms of 'contemporary community standards' as defined in *Miller* without further specification, as was done here, or it may choose to define the standards in more precise geographical terms, as was done by California in *Miller*.'"** (Emphasis supplied)

Thus, despite the assertions of petitioners to the contrary, the fact that La.R.S. 14:106 does not define the "community" whose standards are to serve as a benchmark in obscenity prosecutions does not render that statute constitutionally infirm. Keeping in mind that La.R.S. 14:106 reflects in almost verbatim detail the *Miller* test, it is paradoxical to conclude that because the statute embraces the constitutional boundaries set forth by this Court, it is therefore unconstitutional. Petitioners' arguments are improvident and defile well established jurisprudence.[9]

Respondent would be remiss if it did not vociferously challenge petitioners' comment on page 22 of their Petition for Writ of Certiorari that this Court has embraced as constitutionally valid a procedure which permits jurors to assess the issue of community standards vis-a-vis obscenity prosecutions, " . . . but only to the extent that the government has determined that the relevant community coincides with the vicinage from which the jury is drawn." Petitioners go further and then declare in their petition that:

> "The problem in Louisiana is that . . . adopting that very option can constitute reversible error",

citing the State of Louisiana's Fourth Circuit Court of Appeal decision of *State v. LeBlang*, 530 So.2d 601 (La.App. 4th Cir. 1988).

---

[9] As respondent argued in the courts below, Louisiana jurisprudence has, with unanimity, rejected the precise arguments of vagueness which the petitioners now advance, relying upon the edicts of this Honorable Court. *State v. Burch*, 365 So.2d 1263, 1265 (La. 1978); *State v. Amato*, 343 So.2d 698, 702 (La. 1977); *State v. Wrestle, Inc.*, 360 So.2d 831, 834-835 (La. 1978); *State v. Davis*, 457 So.2d 91, 93 (La.App. 4th Cir. 1984).

Jurors in Louisiana are selected from the parish where the alleged crime occurred. LSA-Const.Art.I, §16. As alluded to previously, this Honorable Court has declared that it is constitutionally permissible to allow jurors to rely on the understanding of the community from which they come relative to a determination of contemporary community standards. *Jenkins v. Georgia*, 418 U.S. at 157 ("*Miller* held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to contemporary community standards . . . "). The problematical area discussed in the Louisiana state court decision of *State v. LeBlang*, cited by petitioners, was not the product of permitting jurors to determine the applicable community and the standards thereof, but rather the result of a trial court instructing the jury to apply standards of a specific geographical area which was not defined statutorily by La.R.S. 14:106. If anything, that case illustrates the precipice of an attempt to define geographically the relevant "community".

Respondent contends that it is a reflection of sound reasoning by both this Honorable Court and the jurisprudence of the State of Louisiana to permit jurors to ascertain from their collective experiences the precise communities whose standards are pertinent in the assessment of an obscenity prosecution. Such a process is neither vague nor places merchants in situations where they cannot, with a reasonable degree of certainty, determine whether their conduct and activities will be proscribed.

In conclusion, respondent submits that petitioners have expressed no reason whatsoever to disturb the edicts of this Honorable Court and, parenthetically, the courts of the State of Louisiana and impose upon Louisiana a

dictate which this Court has found to be constitutionally unnecessary.

CONCLUSION

On the basis of the foregoing, the STATE OF LOUISIANA, respondent, submits that this Honorable Court should **DENY** the Petition for Writ of Certiorari to the Supreme Court of the State of Louisiana. The decisions of the Louisiana Courts on the issues raised by the instant writ application do not offend any principle of the United States Constitution, inclusive of the First and Fourteenth Amendments.

Respectfully submitted:

CHESTER R. CEDARS
Assistant District Attorney
St. Martin Parish Courthouse, 2nd Floor
St. Martinville, LA 70582
(337) 394-2220
Attorney for State of Louisiana